

United States  
Court of Appeals  
for the Ninth Circuit

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SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

JOHN MARTIN SOUZA, LUCILLE JOSEPHINE SOUZA, JAMES  
LAWRENCE SOUZA, BENJAMIN SOUZA, minors, by and  
through their Guardian ad Litem, JOSEPHINE SOUZA, JOSE-  
PHINE SOUZA, individually, and MARY ADELE SOUZA and  
GERALDINE SOUZA, LAWRENCE SOUZA and RICHARD  
SOUZA, Minors, by and through their Guardian ad Litem, H.  
G. EASTMAN,

Appellees.

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Transcript of Record

In Two Volumes

VOLUME II.

(Pages 417 to 451, Inclusive)

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Appeal from the United States District Court  
for the Northern District of California,  
Southern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States Court of Appeals  
For the Ninth Circuit

No. 12153

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JOHN MARTIN SOUZA, LUCILLE JOSE-  
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SOUZA, LAWRENCE SOUZA and RICHARD  
SOUZA, Minors, by and through their Guardian  
ad Litem, H. G. EASTMAN,

Appellees.

STIPULATION CORRECTING AND SUPPLE-  
MENTING TRANSCRIPT OF RECORD

It is stipulated between the parties hereto, by their  
respective counsel, as follows:

I.

1. On p. 202 of the printed Transcript of Record  
herein (p. 149 of the original Certified Reporter's  
Transcript) it appears that the Deposition of H. J.  
Johnson was read. Said Deposition does not appear  
in the Transcript of Record and the whole of said  
Deposition was not read. Accordingly, at the point  
indicated, the record is supplemented and corrected  
by adding thereto the matter contained in paragraph  
2 of this Part I of this Stipulation. Said matter is

substituted in the place of the matter appearing in the printed Transcript of Record, p. 202 (Original Certified Reporter's Transcript, p. 149) after the words, "The Court: All right," down to the words, "The Court: Call your next witness," on page 203 of the printed Transcript of Record (Original Certified Reporter's Transcript, p. 150).

### DEPOSITION OF H. J. JOHNSTON

2. "Mr. Myers: Q. Will you state your full name, please? A. Howard John Johnston.

Q. How do you spell that?

A. J-o-h-n-s-t-o-n.

Q. Where do you live at present, Mr. Johnston?

A. At the Crane Hotel.

Q. How long have you lived there?

A. Oh, about four weeks or three and a half, somewhere around there.

Q. Where did you live before that?

A. I lived at 1138 Mission, Alex Hotel.

Q. How long did you reside there?

A. Oh, I would say about three weeks.

Q. Prior to that time where did you live?

A. In Florida.

Q. Where in Florida?

A. Hollywood, Florida.

Q. How long did you live in Hollywood, Florida?

A. Oh, somewhere between a year and a quarter of a year and a half, somewhere around there.

Q. During the time that you lived in Hollywood, Florida, were you employed? A. Yes, sir.

Q. And what as?



A. Assistant golf professional.

Q. Where? A. At Hollywood, Florida.

Q. The Hollywood Club, A. Yes.

Q. How old a man are you, A. Forty-three.

Q. What is your present occupation.

A. I am not doing anything; on a vacation.

Q. On the 11th of October, 1945, what was your occupation?

A. I was fireman on the Southern Pacific Railroad.

Q. How long prior to the 11th of October, 1945, had you been employed by the Southern Pacific Company as a fireman?

A. Oh, I would say about two months.

Q. Before that time had you had railroad experience? A. Yes.

Q. Whereabouts?

A. Well, I worked for the railroad out of—worked in the yard in Ogden, Utah.

Q. What company?

A. Gee, I can't even remember the company. It was owned by—the yards are owned by the Union Pacific and the Southern Pacific, and they have a name for it.

Mr. Dunne: Ogden Union Terminal and Depot Company? A. Yes.

Mr. Myers: Q. How long were you employed there? A. Two and a half months.

Q. How long after the 11th of October, 1945, did you remain in the employ of the Southern Pacific Company? A. Between two and three weeks.

Q. At that time—and when I say at that time I

mean around October 15, 1945, whereabouts did you live?

A. At the—when I was out on the road I lived in a hotel, but I lived at the clubhouse when I worked at Tracy, lived at the clubhouse; they have a clubhouse for the railroad men.

Q. That was maintained in Tracy for railroad men?

A. Yes. When I was in Sacramento I lived at a hotel; I don't even remember the name of it now.

Q. How long did you live in California prior to October 11, 1945?

A. Well, I—it was when I started working for the Southern Pacific, when I came down from Ogden, Utah. I would say around two months.

Q. All right. And then you left the employ of the Southern Pacific Company, which I believe you stated was about two weeks after October 11, 1945, what did you do then?

A. I went to work for the Western Pacific.

Q. Whereabouts?

A. In the Feather River Canyon, Portola or Oroville, worked the extra board there—worked the extra board there where they used to cover both divisions, the Eastern and the Western. The Eastern is from Portola to Winnemucca and the Western is from Portola to Oroville.

Q. How long did you work for the Western Pacific? A. Somewhere around three months or more, a little more.

Q. After you left their employ what did you do?

A. I didn't do much of anything. I hired out on the Santa Fe and they shipped me to Winslow, Arizona, and I turned the job down because they told

me it was a good job but when I got there they told me I had to work the extra board, and I worked the yard until I earned enough seniority to go on the road, and they promised me I was supposed to have a road job, but when I got this I refused the job and they paid my transportation back to San Francisco.

Q. Then when did you go to Florida?

A. Well, I didn't go to Florida then; I monkeyed around here quite a while; didn't do much of anything, there wasn't much to do, wasn't much work, so I couldn't get on the railroad. Things kind of dropped down and I didn't do much of anything, no actual work.

Q. When did you go to Hollywood, Florida, then?

A. Oh, I would say between a year and a year and a half ago.

Q. All right. Now, on the 11th day of October, 1945, were you a member of an engine crew employed by the Southern Pacific Company?

A. Yes, I was the fireman.

Q. And as such do you recall an accident that happened on the Southern Pacific right-of-way near Beckwith Road at a point west of—north of Modesto?

A. Yes.

Q. You were the fireman on that locomotive, were you?

A. Yes.

Q. And who was your engineer?

A. Glanville.

Q. Was there anyone else on the locomotive besides you and the engineer?

A. Yes, there was a brakeman.

Q. And do you recall the number of that engine?

A. No, I don't recall the number.

Q. What particular type of engine was it?

A. 2400.

Q. 2400 class? A. Yes.

Q. Was that a passenger train engine?

A. Yes, passenger.

Q. And at the time of the happening of this accident were you engaged in pulling cars or was the engine running light?

A. No, we were going light.

Q. So that as far as this particular engine was concerned you went on duty with that engine as a fireman at Fresno, is that right?

A. Yes. It was considered as a train, although it had no cars on it—had markers on it.

Q. It had markers on it? A. Yes.

Q. It was at Fresno when you went on duty?

A. Yes.

Q. Do you recall what time it was that you left Fresno? A. No, I don't recall that.

Q. Was it some time during the morning of October 11th? A. Yes, it was early morning.

Q. And this accident that happened out on the Southern Pacific right-of-way at the intersection of Beckwith Road, about what time in the morning was it that the accident happened? A. 9:05.

Q. Do you remember the weather, whether it was a clear day or what?

A. Clear, sunny morning.

Q. Did that engine for the train that you—did the engine have a train number designation or anything of the sort?

A. I don't know what you mean, what you mean by train number.

Q. Well—

A. Yes, it was Second 59, Second Section of 59.

Q. Do you recall where this engine had made its last stop before reaching the scene of the accident?

A. No. We made no stops; there were no stops I can recall, unless—no, there were no stops. We had no train.

Q. Have you any idea how far north of Modesto it was that this accident happened?

A. I would say somewhere around a mile.

Q. In other words, your next station would be Salida, is that correct?

A. Well, of course, I only made the run a couple of times and I really didn't know the stations, so I wouldn't know.

Q. You were out of the yard limits of Modesto though when this accident happened?

A. Yes.

Q. Now, you have been talking about an accident taking place. That was an accident between your locomotive and some other vehicle?

A. Yes, an automobile.

Q. What type of automobile was it?

A. It was a Ford coupe, kind of slate gray color.

Q. Did you see that automobile before the accident happened?

A. Yes, I saw it as it came up to the tracks.

Q. As it came up to the tracks was it traveling on this road we have just talked about? We can stipulate it was Beckwith Road, can we not?

Mr. Dunne: That is right.

Mr. Myers: Q. It was on this particular crossing when you saw it, was it? A. Yes.

Q. Was it on your side of the locomotive?



A. Yes.

Q. At that time your locomotive was northbound to the layman, but I suppose you railroad men would call it westbound?      A. Westbound.

Q. In other words, going towards San Francisco?

A. Going towards Sacramento.

Q. Where was this automobile with reference to the tracks that your engine was traveling on when you first saw it?

A. Well, I saw it pull up, but the car was going slow; it looked like it was stopped, and I thought it was going to stop but evidently it didn't. and the next time I noticed it, why, it looked like it was going to be in front of the locomotive, so, of course, by then we were right on top of it and I yelled for an emergency stop to the engineer, and it was too late.

Q. Now, at any time did you see that automobile at a stop? Did you see that automobile at any time at a stop?

A. Well, it was kind of hard to judge. It looked like it was stopped; it wasn't going very fast. I don't say it was going over between five and ten miles an hour, and of course we were going pretty fast and it is hard to judge.

Q. How far was it from the tracks when you saw it?

A. Well, I saw it pull up and, well—where the post is, where the warning post is, I would say it was around there, and it looked like it was stopped, but evidently was not.

Q. You say it looked like it was stopped?

A. Yes. I couldn't say for sure, but it wasn't going very fast, I know.

Q. How many feet would you say it was from the crossing?

A. Oh, I would say somewhere around 200 or 250.

Q. I mean the automobile, how many feet from the crossing was the automobile, would you say?

A. Oh, I would say around 15, 10 or 15 feet.

Q. All right. At that time where was the locomotive with reference to the line of travel of this automobile on Beckwith Road, how far away was it?

A. Somewhere around 200 feet.

Q. How fast was the engine going at that particular time?

A. I would say between 65 and 70 miles an hour.

Q. For what distance had it been traveling at that speed of 65 or 70 miles an hour?

A. For a number of miles, I don't recall just how many, but for a number of miles—after we left Modesto.

Q. Now, this trainman that was in the cab of the locomotive, do you know how he happened to be in there? Was he one of the members of the crew?

A. No, he wasn't a member of the crew. He was just riding. He lived along the road there, the railroad some place, and I don't know exactly where it was but it wasn't very far from where the accident happened, and the engineer stopped to let him off at some crossroad.

Q. Now, when the engine was about 200 feet from the crossing, going at the speed that you have said it was going, can you tell us whether or not the whistle was blowing or the bell ringing at that time?

A. There was no whistle. He might have blowed

the whistle after we hit the car, I don't know, don't recall. I was nervous.

Q. But up to the time of the collision—

A. No, there was no whistle.

Q. How about the bell, was any bell ringing?

A. Well, there might have been a bell afterwards, but I turned the valve on and the bell didn't ring. I saw the car—I thought the car was stopped, and it wasn't necessary to use the hand cord.

Q. For a distance of a quarter of a mile prior to reaching the intersection of Beckwith Road and the Southern Pacific right of way can you tell us whether or not in that distance the bell was ringing or the whistle blowing, either one?

A. No, it wasn't.

Q. What, if anything, was the engineer and this other person that was riding in the cab of the engine doing at the time of the happening of the accident?

A. Well, they were holding a conversation.

Q. Where was the engineer? I mean by that what was his position at the time?

A. Well, in order so that this brakeman could hear him he was facing the brakeman, which would be facing me. I am across from him.

Q. In between you and the engineer?

A. The brakeman was right alongside of him, right close to him.

Q. Did the engineer do anything at all with reference to the operation of this engine before you called to him for an emergency stop?

A. No. He applied the brakes when I hollered.

Q. When he applied the brakes then what happened?



A. Well, we hit the car and knocked it over to the righthand side of the tracks and then got stopped as soon as possible, stopped and backed up to the accident.

Q. About how far from Beckwith Road was it that the engine came to a stop?

A. I would say about three city blocks.

Q. What is your estimate of the length of a city block that you have in mind when you say about three city blocks?

A. Well, I don't know, I would say somewhere around 250 or 300 feet, somewhere around there.

Q. To the block            A. Yes.

Q. All right. When the engine backed up—I believe that is what you stated, that the engine backed up afterwards, is that right?            A. Yes.

Q. After it had come to a stop it backed up, did it?

A. Yes.

Q. What, if anything, did you do then?

A. Well, I had to flag the engine because there was no flagman and it is the fireman's job when you have a light engine, why, it is his job to protect the train.

Q. How much time would you say elapsed between the time you called to the engineer "Emergency stop" and the happening of the accident?

A. Just a few seconds.

Q. What do you mean by a few?

A. Well, I would say two or three seconds.

Q. Did you see the car or any of the occupants of the automobile after the accident happened?

A. Yes. When we got backed up they had them laying out to the right on the road there, had them

laid out there. And the elderly man, he was dead. He was dead by the time we got back, and the one son, he was groaning and the way he was groaning it didn't look like he was going to live; and the other was laying out, kind of propped up like, looked like he had a broken arm or broken leg, I don't know, couldn't tell you—in fact, I couldn't spend much time there because I just glanced and then I had to go back and flag the train, the engine.

Q. Do you have any memory as to when, if at all, the whistle was blown or the bell was rung on the engine, prior to the time of the collision?

A. It was blown at some of the crossings. It might have been blown at the crossing prior to Beckwith Road, I don't quite recall.

Q. Other than that, you say that the whistle or the bell did not ring or blow up to the time of the collision?      A. That's right.

Q. You say this engine was a passenger type of engine. Did it have any distinctive marks on the front end of that engine?

A. Yes. They have them painted aluminum, silver aluminum or silver.

Mr. Myers: This is not meant to be the engine involved, Mr. Dunne, but I just want to show it to the witness.

Q. Is this a fair representation of the general appearance of that engine (showing photograph to witness)?

A. Yes, that is the type locomotive.

Q. And that shows a silver color in front of the boiler?

A. Yes, that is what I had reference to.

Q. That is a fair representation?

A. Yes."

Mr. Myers: I offer that.

Mr. Dunne: Mr. Myers, I can provide you with a photograph of the exact engine in place of this.

Mr. Myers: May I see it?

Mr. Dunne: Yes.

Mr. Myers: Your Honor, we will offer this photograph in evidence as plaintiff's exhibit next in order, which counsel says is a photograph of the engine involved in the accident.

Mr. Dunne: At the proper time I will put the other two in, then.

(The photograph referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 10.)

(Reading resumed as follows:)

"Q. (By Mr. Myers): During the happening of the accident or immediately thereafter did the engineer make any comment at all as to the whistle blowing?"

Mr. Dunne: Your Honor, we will object to that upon the ground it calls for hearsay.

Mr. Myers: I think it is close enough to be part of the *res gestae*.

The Court: Where is that?

Mr. Dunne: It is at the top of page 20, if the Court please. The question begins at the last line on page 19, line 26.

The Court: Any statement at or near to it is admissible. If there is a sufficient lapse of time, then

it comes within the rule of narrative of past events, but any ejaculation or statement at or about the time is permissible, especially as this was not made to a third person who later on might be investigating it. I will allow it, and the weight to be given it is up to the jury, and I assume you will have the man referred to there to give his version of what took place. The objection is overruled. Read the question and answer now.

“A. Yes. After we got stopped—I don’t know whether he was talking to me or the brakeman—but he did say, ‘You see what happens when you don’t blow the whistle.’

Q. You say after you left the scene of the accident, at a point farther on the engine stopped to let off this trainman, is that right? A. Yes.

Q. Was that a scheduled stop?

A. No, just a roadway.

Q. Have you told us all you know about this accident?

A. Well, outside of after we let this brakeman off, why, the engineer went 45 miles an hour—that is the regulation speed of the locomotive—and he applied the brakes to see how far he would go by stopping, and it was around eight and a half poles.

Q. Eight and a half poles? A. Yes.

Q. How far would that be?

A. Well, not too far. I couldn’t name the distance.

Q. Would that be about the same distance it traveled after the accident happened?

A. Oh, no, no.

Q. In comparison to the distance it traveled after the accident how far?

A. Oh, I would say about a half a block, a little over a half a block maybe; maybe a block. I am not quite positive, but not more than a block and a half.

Q. Did you have a whistle cord? Did you have a bell cord attached to the bell? A. Yes.

Q. As well as the bell valve?

A. Yes, uh-huh.

Q. Did you pull that cord at any time?

A. No, I didn't get a chance to get at it. I had to shut the oil off and apply the brakes, and it looked like the car was going to stop where it was, and after all I thought it wasn't necessary, if the engineer didn't blow the whistle it wasn't necessary to ring the bell."

Mr. Myers: I think that is all.

### Cross-Examination

"Q. (By Mr. Dunne): This test of making a stop at 45 miles an hour, that was made on the same day, was it? A. Yes.

Q. After the accident?

A. Yes, after the brakeman was out.

Q. Where was the brakeman let off?

A. Well, I don't know. I would say somewhere around three or four or five miles from where the accident was; I don't know, don't remember. After an accident like that you are excited and you just don't recall.

Q. That would be railroad west of the point of the accident, is that correct? A. Yes.

Q. What was the brakeman's name?

A. I don't know.

Q. Do you know now? A. No.



Q. Do you know the name of the place where this test was made?

A. No. All I know is that it was a road crossing.

Q. Along where, between what stations?

A. I don't recall that either.

Q. How did you know it was eight and a half poles?

A. Because we counted the poles, and he asked me to put that in my statement.

Q. And did you put it in the statement?

A. Yes, he sent me his accident report. I went back to Tracy and he sent me his accident report and I made mine out similar to his.

Q. When did he send you his accident report?

A. Oh, I would say it was about two days after the accident.

Q. Where were you when you made out your accident report?

A. In the hotel or club.

Q. At Tracy?

A. At Tracy, yes.

Q. What kind of a report was that that you made out?

A. Well, it was like his, just that it was a misstatement. The reason I made it out was that I was working for the railroad and he asked me to go along with him, and I did it for his protection.

Q. How did he ask you to go along with him?

A. Well, he said not to say anything about the brakeman being in the cab, and that he was blowing the whistle at the second—at the time of the accident he was blowing the whistle the second time.

Q. And where was it that he asked you to say that?

A. Well, we stopped after we got to Sacramento;

we stopped and we had a couple of beers and lunch.

Q. That was on the day of the accident?

A. Yes, it was after we got to Sacramento.

Q. When did he make out his report?

A. Well, he said that he was nervous and he wasn't going to make it out that day, and he would make it out and send it to me.

Q. And you didn't make yours out that day?

A. I didn't make it out until he sent me his.

Q. What kind of form did you make it out on?

A. I don't know the name of the form, but it is just an accident report.

Q. Why didn't you make one out at the round-house in Sacramento?

A. Because the engineer didn't want it that way, and nobody asked me to.

Q. You knew you were supposed to make one out without being asked, didn't you?

A. Yes, I knew that.

Q. You knew you were supposed to make them out quickly, didn't you?

A. Yes, I realized that, but I figured, 'Well, I don't like to see a man lose his job,' and I figured that he would.

Q. Who handles the bells?                      A. I do.

Q. Did you say anything in that statement as to the bell, as you now recall, about the bell?

A. Naturally I did.

Q. What did you say about the bell?

A. I said it was ringing.

Q. That would be up to you?                      A. Yes.

Q. You wouldn't be protecting the engineer saying anything about the bells, would you?

A. No.

Q. Now, can you fix any better for me the place where that test was made?

A. Well, outside of it was just a few miles beyond the accident, after the brakeman was out of the cab. I just don't recall where it was. After all, it is a couple of years and I actually didn't know the road myself.

Q. What kind of track was it at that point?

A. One track.

Q. Level or curved?                      A. Level.

Q. Straight or a curve?                      A. Straight.

Q. These poles, what kind of poles were those?

A. Those are poles alongside the tracks. I would say they are, oh—well, I don't know what you call them.

Q. Poles that carry wires along by the tracks?

A. Yes.

Q. Telegraph wires, is that right?

A. Yes.

Q. Now, whatever you may have said about the whistle blowing or the bell ringing, the statement that you stopped in eight and a half pole lengths is the truth?                      A. Yes.

Q. That is, at the time of this test?

A. Yes.

Q. Now, right before the accident did you hear the engineer say anything?

A. No. He was talking to the brakeman.

Q. Do you know what he said?

A. No, I couldn't hear him. I don't know what the conversation was about.

Q. After the accident what, if anything—just



tell me everything that you can remember that the engineer said.

A. Well, he said, 'See what happens when you don't blow the whistle.' So I backed up and there wasn't anything said until after we got going, and I held no conversation with him until after the brakeman got out. And then he said he was going to make a test stop.

Q. That is the only thing then, from the time of the accident until—at least until you backed up to the point of the accident, that the engineer said, 'See what happens when you don't blow the whistle,' is that right?      A. Yes.

Q. Did he say anything about the bell valve?

A. No.

Q. Did he say anything to you about not ringing the bell?      A. Yes.

Q. How does the bell on that locomotive operate?

A. Valve.

Q. As I understand it, you left Fresno that morning?      A. Yes.

Q. Have you any idea what time you left?

A. I don't recall. I know it was early in the morning.

Q. The first stop you made was at the time of the accident, is that right?

A. Yes, that is, an actual stop. We slowed down at times before.

Q. Do you remember where you slowed down?

A. No, I don't recall. I told you I don't know the road. I couldn't remember; I wouldn't know where the hell we did slow down.

Q. You know Modesto, don't you?

A. Yes.

Q. Do you know any towns between Modesto and Fresno?      A. Not that I can recall now.

Q. Was the bell ringing coming out of Fresno?

A. Yes.

Q. Automatic bell ringer?      A. What?

Q. The automatic bell ringer?      A. Yes.

Q. How long did it ring after you left Fresno?

A. Oh, I just don't recall. Sometimes they will ring and sometimes they won't.

Q. Did you shut it off at any time after you left Fresno?

A. Naturally you open it up and shut it off.

Q. Where did you shut it off?

A. Well, at some crossings I would shut it off.

Q. I want to know where you shut it off the first time after you left Fresno.

A. I don't remember.

Q. You don't remember whether you shut it off at all?

A. Sure, I shut it off. It was shut off when I turned it on before the accident.

Q. After you shut it off the first time did you turn it on again before you got to Modesto?

A. Yes, I had it ringing before we got to Modesto, I remember that.

Q. Was it ringing going through Modesto?

A. Well, I believe at some crossings it was and at some I had to use the rope.

Q. It would shut off even if you didn't shut the valve off?

A. Sometimes it would work and sometimes it wouldn't.

Q. After it got started ringing then it would shut off by itself? A. It wouldn't even start.

Q. After it got started, when it was ringing with the automatic bell ringer?

A. Usually when it got started it would keep on ringing.

Q. It was ringing going through Modesto, is that right? A. Yes.

Q. Now, did you shut it off after you passed the station at Modesto?

A. Naturally. I am not going to have the bell ringing, if it is working, but some of the times it wouldn't work.

Q. But it didn't shut itself off after it got started? If it was ringing through Modesto did you shut it off after you passed the station at Modesto?

A. I told you it wasn't ringing at every crossing. It wouldn't ring. I turned the valve on and it wouldn't ring and I would have to use the hand cord. After that, maybe at the next crossing, I would turn it on and it would work.

Q. Well, let us get this. As you went by the station at Modesto was it ringing?

A. Ringing?

Q. Yes. A. No.

Q. Wasn't ringing at the station at Modesto?

A. Raining?

Q. No, ringing.

A. I thought you said 'raining'.

Q. No, ringing.

A. Yes, it was ringing at the station. I don't recall—if the automatic valve didn't work I would use

the cord. I don't remember whether I used the cord at Modesto or not.

Q. Do you remember using the cord at Modesto any place that day?

A. Yes, I used it; I had to use it.

Q. Where did you use the cord?

A. I don't recall the places.

Q. You don't know whether you were using the cord at Modesto?

A. I told you at some of the crossings at Modesto I used the cord. I had to because the valve wouldn't start the bell.

Q. How about the station, were you using the cord there?

A. Yes, you have to have the bell going through a station.

Q. Were you using the cord at the station or was the bell ringing on the automatic bell ringer?

A. I don't recall that now.

Q. Do you recall any point where it was operating with the automatic bell ringer?

A. I don't recall the places. Sometimes it would ring. There is a lot of crossings going through Modesto. At some crossing it would work and some it wouldn't.

Q. Sometimes they won't start when they are right on center, is that right?

A. You mean the bell?

Q. Yes.

A. No, they will start if they have enough air.

Q. Did you ever have to turn the valve and then give it a start with the cord and then it will ring by itself?

A. Yes, you have to do that sometimes.

Q. If I understood you correctly—and you correct me if I am wrong about this—that going through Modesto and from Modesto on you now have no recollection of whether the bell was ringing by the automatic bell ringer or whether you were operating it by the cord, pulling the cord? A. Yes.

Q. That is right? A. Yes.

Q. And you have no recollection how long it rang after you left the station at Modesto?

A. Well, I don't know what you mean, how long it rang. You don't turn the bell on and keep it ringing many miles.

Q. Was the bell ringing at the crossing that you came to before the one at which this accident happened? A. I don't recall.

Q. If you don't recall you wouldn't know whether you shut it off or not, would you?

A. Well, I think I would know if it was going from crossing to crossing, when it was ringing. I don't know whether I used the cord or the valve at the crossing before.

Q. Was it ringing at that crossing?

A. Yes, it was ringing at that crossing.

Q. By the way, did you make any report that the bell ringer wasn't working?

A. No. That would involve myself and the engineer.

Q. So far as you were concerned, you didn't make a report on it?

A. The engineer said not to.

Q. He also said not to make a report that the bell ringer wasn't working? A. Absolutely.



Q. How fast did you run between Fresno and Merced?      A. Merced?

Q. Yes.      A. How fast?

Q. Yes.      A. Was he running?

Q. Yes.      A. At the time of the accident?

Q. No, no, between Fresno and Merced.

A. I don't recall Merced.

Q. How fast did you run between Modesto and Merced?

A. I don't remember Merced. But after the accident he run 45 miles an hour.

Q. How fast did he got through Modesto?

A. Plenty fast, fast enough.

Q. How fast in miles per hour?

A. Oh, I would say he was doing 45 anyway.

Q. From the time you left Fresno until the time of the accident what was the slowest that you went?

A. Well, the slowest we went was in through Modesto.

Q. That 45 miles an hour, is that right?

A. Yes.

Q. So from Fresno to the point of the accident the locomotive, once you got rolling was going 45 miles an hour or better?      A. Better.

Q. Are you a married man?      A. Not now.

Q. Were you married in 1945?      A. No.

Q. You were not married then at the time you first came to California?      A. No.

Q. Had you been married at any time between the time you first came to California and now?

A. No.

Q. Before you first came to California and now?

Q. Before you first came to California you were railroading at Ogden, is that right?      A. Yes.

Q. What were you doing there for the company at Ogden? A. Firing.

Q. Where had you come from when you went to Ogden? A. Pennsylvania.

Q. Where is your home? Where was your home before you came to Ogden? A. Pennsylvania.

Q. How long had you lived there in Pennsylvania before you came to Ogden?

A. I was born in Pennsylvania.

Q. When you were in Pennsylvania what was your business?

A. I worked for the railroad.

Q. Had you railroaded there? A. Yes.

Q. What railroad did you work for there?

A. The Pennsylvania.

Q. In what capacity?

A. Well, I worked as a—worked in the round-house. I didn't work all the time on the Pennsylvania; I worked on other railroads. I don't think it is necessary that that information—don't like to give that information.

Q. Where did you work in Pennsylvania?

A. At Erie.

Q. What name did you work under?

A. My name.

Q. Have you ever worked for a railroad under any other name? A. No.

Q. What other railroads besides the Pennsylvania did you work for?

A. Well, I worked for a number of them. I have worked—well, I don't like to tell all the railroads.

Q. Then you refuse to answer that question?

A. Yes, I refuse to answer. I don't think it has any bearing on the accident.

Q. How long did you work for the Pennsylvania?

A. About fifteen years.

Q. And how long all together did you work for other railroads?

A. Well, I think I worked about seventeen or eighteen years, somewhere around there.

Q. What business were you engaged in just before coming to Ogden?

A. I worked for an aluminum plant.

Q. You said that you had worked as an assistant golf professional at the Hollywood Club in Florida. Had you worked as a *gold* (golf) professional before this accident?

A. Yes, years ago, before I went on the railroad.

Q. Now, after you left the Southern Pacific you went to the Western Pacific and were there for a while and then you went to the Santa Fe and they sent you to Winslow, Arizona, is that correct?

A. Yes.

Q. Do you remember about the date of that?

A. No, I don't recall.

Q. And then you came back to San Francisco, is that correct?

A. Yes.

Q. Do you remember about what date you came back to San Francisco?

A. I don't know.

Q. Can you fix it with reference to Christmas of 1946?

A. Yes. It was after Christmas. I was working for the Western Pacific at Christmas time.

Q. That is Christmas of 1946?

A. Yes.



Q. How did you happen to come out to San Francisco this last trip?

A. Well, I received word from my folks about this accident.

Q. I want to show you this and ask you if this is your signature—all the writing on that page is in your handwriting? A. That's it.

Mr. Dunne: I will offer this in evidence as our exhibit and ask the reporter to mark it.

(Document marked by Notary Public as Defendants' Exhibit 1.)

Q. (By Mr. Dunne): Are you expecting to leave the State of California soon?

A. I think possibly I will.

Q. Will you return to Florida then?

A. Yes, I think I will.

Q. Florida is your home at the present time, is it?

A. Yes.

Q. And before coming to Ogden, Pennsylvania has been your home? A. Yes.

Q. And those are the only two regular homes you have had?

A. Well, no, not exactly. I have stayed at other places but not too long, not long enough to call it a home.

Q. When you came out to California from Pennsylvania and took these various jobs, it was just a temporary proposition?

A. Yes. I realized that when I came out.

Q. You expect to go back East? A. Yes.

Mr. Dunne: I have no further questions."

Mr. Myers: Do I understand counsel is not inquiring into the motives, then?

Mr. Dunne: No, the only part of the impeachment is the statement which is attached to the original deposition, if your Honor please.

The Court: All right. Now you may read the statement.

Mr. Dunne: May we have it detached and marked?

The Court: I think you had better detach it. The jurors may want to see it and, as you know, we never send depositions out to the jury.

Mr. Myers: May I ask your Honor, are there any other exhibits there besides the statement?

Mr. Dunne: I think just the photograph.

(The statement referred to was thereupon received in evidence and marked Defendant's Exhibit Q.)

Mr. Dunne: If your Honor please, before reading it may I exhibit it to the jury so they may see its form and I might explain the form to them?

The Court: Very well.

(The Defendant's Exhibit Q was thereupon read to the jury.)

Mr. Myers: There is nothing on the back except the reporter's notation, the reporter who took the deposition.

The Court: The clerk will detach it and give it a proper number, and I think I have already informed you that when you begin your deliberations you are entitled to see all those exhibits which have been introduced in evidence. Some of them you have seen,

some of them counsel have referred to, and some of them they have called your attention to, knowing that you can have them all when you begin your deliberations.

## II.

The record is augmented by adding thereto the following:

Plaintiff's proposed Instruction No. 9 was as follows:

### Plaintiff's Instruction No. 9

You are instructed that a person in the exercise of ordinary care and caution, himself, in approaching a railroad track, has a right to anticipate until his faculties inform him to the contrary, that those in charge of a railroad train which might be approaching such crossing would exercise ordinary care and caution and cause a bell to be rung or whistle blown, as required by law.

Lahey v. Southern Pacific Co., 16 Cal. App. (2d) 662.

The following instructions were proposed by the defendant:

### Defense Instruction No. 27

In considering the conduct of those in charge of the railroad locomotive and in passing on the claim that defendant was guilty of negligence in operating and propelling it, you will bear in mind that the engineman, until put on notice to the contrary, had the right to assume and presume that any person operating an automobile toward or onto the railroad track would perform the duty which the law of this State imposes upon the driver of such an automobile

and, in the reasonable exercise of his faculties of observation and caution, would not attempt to cross the track in dangerous proximity to an approaching railroad locomotive if the same were plainly open to view so that collision with the locomotive could be avoided if the automobile driver exercised reasonable care and complied with the duties imposed upon him by law. Accordingly, in consideration this case, you must consider the duties which the law imposed upon John Martin Souza, the driver of the automobile, in the operation of that automobile, as he approached the railroad track, not only from the point of view of determining whether there was any negligence on his part, but also from the point of view of the bearing which the duties he was required to perform, and which in the absence of notice to the contrary the enginemen were entitled to assume he would perform, may have on the claim of negligence on the part of defendant.

Billig v. S. P. Co., 192 Cal. 357;

Church v. Payne, 36 CA 2d 382 (hr. den.).

#### Defense Instruction No. 37

By Section 352(b) of the California Vehicle Code, in effect at the time of this accident, it is provided that any negligence of a minor, whether licensed or not under that code in driving a motor vehicle upon a highway with the express or implied permission of his parents, shall be imputed to such parents for all purposes of civil damages. Accordingly, if in this case there was any negligence on the part of the driver, John Martin Souza, which was a proximate cause of the accident and death of his father Antonio

Azevedo Souza, such negligence is to be imputed to the father with the same effect as though the father himself had been guilty of negligence.

Solloway v. Watts, 58 CA 2d 595;

Grover v. Sharp, etc., Co., 66 CA 2d 736 (hr. den.);

Milgate v. Wraith, 19 C 2d 297;

Rawlins v. Lory, 44 CA 2d 20, 25.

Defense Instruction No. 38

If you find that at the time of this accident John Martin Souza and his brother, Edward Anthony Souza, in the use and operation of the automobile were engaged in a joint venture or enterprise, and in the use of the automobile were engaged in a common undertaking in which they had a community of interest and in respect of which each exercised or had the right to exercise an equal or joint control and direction and there was, in the use of the automobile, a mutual agency such that the driver, although he was the owner of the automobile, was operating it not alone for his own benefit, but as well for the benefit of his brother and as his agent, then, any negligence on the part of the brother John Martin Souza, who was driving the automobile, is to be imputed to the deceased brother Edward Anthony Souza with the same legal effect as though the deceased brother himself had been guilty of negligence.

Defense Instruction No. 39

Even if you should find that the father, Antonio Azevedo Souza, was not himself negligent or that the deceased brother, Edward Anthony Souza, was not himself negligent, still, if the brother and son



who was driving, John Martin Souza, was guilty of contributory negligence in the operation of the automobile and under the facts of the case and the instructions, his negligence is to be imputed to either the deceased father or the deceased brother there can be no recovery on account of the death of the person to whom such negligence is to be imputed and the negligence of the driver will have the same legal effect to bar any recovery for death as though the person to whom such negligence is imputed had himself been guilty of contributory negligence.

Defense Instruction No. 56

If the driver of the automobile, on the occasion of the accident complained of, and in view of the physical facts then existing at the scene of the accident, had he exercised ordinary care, must have learned of the approach of the locomotive in time to have avoided collision with it, by using ordinary care, then the very fact that the automobile collided with the engine raises a presumption that he did not take the required precautions and did not look or listen (*Loftus v. Ry.*, 166 Cal. 464; *Koster v. S. P.*, 207 Cal. 753), or that, having looked and listened, he endeavored to cross immediately in front of the approaching train, and in either of such events, if so you find, his conduct would constitute negligence proximately contributing to the accident.

*Guyer v. P. E. Ry. Co.*, 24 CA 2d 499, 502 (hr. den.), q. in *Hereoux v. Atchison, etc., Co.*, 28 CA 2d, 401 (hr. den.);

*Dull v. Atchison, etc., Co.*, 27 CA 2d 473, 477;  
*Lindley v. S. P. Co.*, 18 CA 2d 550 (hr. den.).

## Defense Instruction No. 58

Neither the court nor the jury is bound by the mere declaration of a witness, no matter how improbable, incredible, or impossible that declaration may be. The court or jury is only bound by swearing credibility, that is to say, credible swearing is all that is to conclude either the court or the jury in its judgment. It is not enough for a witness to say that he looked with unseeing eyes or listened with unhearing ears. If the established facts and conditions, including the physical surroundings at the scene of the accident, were such that before the accident, and before leaving a place of safety, the driver John Martin Souza, if he had looked in the direction from which the locomotive came, must have seen it in time to have avoided being struck by it, by exercise of reasonable care, and must have seen it while he was in a place of safety, then I instruct you that any testimony, if such there has been, that in such circumstances he did look, but did not see the locomotive, may be disregarded by you.

So. R. Co. v. Walters, 284 U.S. 190, 76 L.Ed. 239;

U.S. v. Ingalls, 67 F2d 593 (CCA 10);

Deadrich v. U.S., 74 F2d 619 (CCA 9);

Loftus v. Ry. Co., 166 Cal. 464;

Chrissinger v. S. P. Co., 169 Cal. 619;

Hughes v. Atchison, etc., Co., 121 CA 271 (hr. den.).

## Defense Instruction No. 58-A

The mere fact that Antonio Azevedo Souza and Edward Anthony Souza were not physically driving

and operating the automobile did not relieve them or either of them from the duty of exercising reasonable care in respect of the operation of the automobile, and each as to his own safety. To the contrary, each was at all times under a duty to exercise such care.

Defense Instruction No. 58-E

Section 596 of the Vehicle Code of the State of California applied to the operation of the automobile involved in this accident. That statute provided:

“No person shall drive a vehicle when it is so loaded, or when there are in the front seat such number of persons as to *abstruct* the view of the driver to the front or sides of the vehicle or to interfere with the driver’s control over the driving mechanism of the vehicle.”

A violation of that statute, if any, constitutes negligence as matter of law. In addition, if there were three people in the front seat of the Ford coupe, if the deceased Edward Anthony Souza was one of those three people if their presence in the front seat, and particular his presence, obstructed the view of the driver to the front or sides of the Ford coupe, or interfered with the driver’s control of the driving mechanism of the vehicle, and he was aware of this and knowingly so placed himself and remained in the Ford automobile so as to bring about such obstruction of the view of the driver or interference with control over the driving mechanism, he was guilty of negligence and no recovery can be had on account



of his death, if that negligence was a proximate cause of the accident.

/s/ JAMES A. MYERS,

/s/ CLIFTON HILDEBRAND,

HILDEBRAND, BILLS &  
McLEOD,

Attorneys for Appellees.

/s/ ARTHUR B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for Appellant.

[Endorsed]: Filed April 27, 1949. Paul P. O'Brien,  
Clerk.

